IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHEILA WARNOCK SEUS, Plaintiff, v. JOHN NUVEEN & CO., INC., Defendant.	Civil Action No. 96-5971

Gawthrop, J. June , 1997

M E M O R A N D U M

Before the court in this employment discrimination suit is Defendant's Motion to Dismiss or Stay and Compel Arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 3-4. Plaintiff opposes this motion, arguing that she never agreed to arbitrate employment disputes and that arbitration would not adequately protect her statutory rights. In order to establish the inadequacy of the arbitral procedures at issue, Plaintiff wishes to depose the National Association of Securities Dealers pursuant to Fed. R. Civ. P. 30(b)(6). The United States Equal Employment Opportunity Commission has joined this action as Amicus Curiae. Upon the following reasoning, I shall grant Defendant's Motion to Dismiss and Compel Arbitration, and I shall deny Plaintiff's Motion to Depose the National Association of Securities Dealers.

I. Background

As a member of the National Association of Securities Dealers ("NASD"), Defendant John Nuveen & Co., Inc. must register with the NASD all employees who deal directly with the public in the purchase and sale of securities. Employees register by filing a Uniform Application for Securities Industry Registration ("Form U-4"), a form developed by the Securities and Exchange Commission in conjunction with the national securities exchanges. Generally, execution of a Form U-4 is a pre-condition for employment with security brokers such as Nuveen.

In January, 1982, Nuveen hired Plaintiff Sheila Warnock Seus as a sales assistant. On April 20, 1982, she signed and filed a Form U-4 containing the following clause: "I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . . ." The Form U-4 also contained a separate "compliance clause," in which Seus agreed "to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time . . . ."

Because Seus registered with the NASD, the form incorporated by reference the NASD's Code of Arbitration Procedure ("NASD Code"). Seus did not receive a copy of this Code. Seus's supervisor told her that the arbitration provision

would not affect her because it was designed to deal with brokers' commission disputes. In fact, the NASD Code covers far more than commission disputes. When Seus signed the Form U-4, the NASD Code provided in pertinent part

> for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company:
> (1) between or among members;
> (2) between or among members and public customers, or others . . . .

§ 1, NASD Code, quoted in Farrand v. Lutheran Bhd., 993 F.2d 1253, 1254 (7th Cir. 1993). In 1993, the NASD explicitly amended its Code to cover disputes "arising out of the employment or termination of employment of associated person(s) with any member . . . ." § 1, NASD Manual (CCH) ¶ 3701 (1995).[1]

Seus filed this Complaint in August, 1996, after receiving a right-to-sue notice from the United States Equal Employment Opportunity Commission ("EEOC"). Seus alleges that Nuveen retaliated against her when she complained of sexual harassment by a fellow employee. Nuveen allegedly discriminated against her on the basis of her sex and age by reducing her annual bonus in 1994, demoting her from her position as Vice President in April, 1995, and constructively discharging her in July, 1995. This conduct, she claims, violates Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et

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1. The parties do not dispute that Nuveen is a "member" of the NASD and that Plaintiff is an "associated person."

seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 951 et seq.. She also is pressing a tort claim for the intentional infliction of emotional distress. Because these claims all arise from Seus's employment, Nuveen argues that they are subject to arbitration pursuant to the Form U-4 and the NASD Code, citing Gilmer v. Interstate/ Johnson Lane Corp., 500 U.S. 20 (1991). Thus, Nuveen moves to dismiss or stay this action and compel arbitration.

II. Discussion

A. Applicability of the Federal Arbitration Act

The Federal Arbitration Act ("FAA") governs arbitration agreements connected to transactions involving interstate commerce. 9 U.S.C. § 2. This statute embodies "a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The FAA not only recognizes the validity of arbitration agreements, but also mandates a stay of judicial proceedings if the suit involves an arbitrable issue. 9 U.S.C. §§ 2-3. If all claims are arbitrable, a court may dismiss the action instead of staying it. Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 835 (E.D. Pa. 1991), aff'd, 972 F.2d 1330 (3d Cir. 1992). A court also may compel arbitration in accordance with the terms of the parties' agreement. 9 U.S.C. § 4.

A preliminary issue is whether the FAA applies to this arbitration agreement. Plaintiff argues the Form U-4 is part of an employment contract and thus is outside the FAA's scope. The FAA explicitly excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court has found, however, that an application to register with a securities exchange is a contract with that exchange, not an employment contract. Gilmer, 500 U.S. at 25 n. 2. Similarly, the Form U-4 here is a contract with the NASD, not Nuveen, and thus it is not an employment contract within the meaning of the § 1 exclusion.

Even if the Form U-4 were an employment contract, the Third Circuit has limited the FAA § 1 exclusion to sailors, railroad workers, and other transportation workers who are "employed directly in the channels of commerce." Great Western Mortgage Corp. v. Peacock, __ F.3d __, 1997 WL 153012 at *4 (3d Cir. Apr. 3, 1997). While at Nuveen, Seus worked as a sales associate, wholesaler, office manager, and vice-president in the Packaged Products Sales Department. Because Seus never acted directly in the channels of commerce, the § 1 exclusion does not apply to any employment contract between Seus and Nuveen.

Plaintiff also suggests that this court may deny Defendant's Motion because her signature on the Form U-4 was neither notarized nor verified. The FAA, however, requires only a written agreement, not a signed one. 9 U.S.C. § 2. See also

Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir. 1987). The absence of notarization or verification does not preclude the FAA's application. In short, the FAA governs this Form U-4's arbitration agreement.

B. Enforceability of the Arbitration Agreement

A finding the FAA applies to this agreement does not entail an automatic stay of litigation. Before a court may either stay litigation or compel arbitration, it must ensure that a valid arbitration agreement between the parties exists and that the dispute falls within the substantive scope of the agreement. See PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990). A court generally should apply ordinary state-law principles on contract formation while performing this task. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 1924 (1995). However, in construing the contractual language or considering defenses to arbitration, a court should resolve in favor of arbitration any doubts regarding the scope of arbitrable issues. Moses H. Cone Mem. Hosp., 460 U.S. at 24-25.

1. Contractual Agreement to Arbitrate

Under the FAA, an agreement to submit a dispute to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Grounds for revocation include

fraud[2] or the use of overwhelming economic power resulting in an adhesion contract. See Gilmer, 500 U.S. at 33.

Plaintiff argues that the Form U-4 is a classic unenforceable adhesion contract because employees sign the Form U-4 shortly after they are hired, when they lack bargaining power. Yet, inequality of bargaining power, standing alone, will not void contractual obligations. See Witmer v. Exxon Corp., 495 Pa. 540, 434 A.2d 1222, 1228 (1981). See also Gilmer, 500 U.S. at 33 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."). To invalidate an agreement as an adhesion contract, the plaintiff also must show that the contractual terms unreasonably favor the other party. Witmer, 434 A.2d at 1228. Plaintiff has made no such showing here. The terms of the Form U-4 appear neither oppressive nor unconscionable. See Beauchamp v. Great West Life Assur. Co., 918 F. Supp. 1091, 1098-99 (E.D. Mich. 1996) (concluding that the Form U-4 is not an unenforceable adhesion contract under Michigan law). Thus, I do not find that this arbitration agreement is an unenforceable contract.

Seus also argues by analogy that the Form U-4 should be held unenforceable for the same reason that Congress invalidated

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2. Plaintiff asserts that her supervisor told her that the arbitration agreement applied only to commission disputes. This assertion raises the possibility of fraud or mistake which might bar enforcement of the agreement. However, Plaintiff does not pursue this argument, and the record before me does not support invalidating the arbitration agreement on these grounds.

"yellow dog" contracts in which employees agree to waive their right to join a union: employees should not be required to waive their statutory rights in order to obtain employment. The analogy between the Form U-4 and yellow dog contracts fails, however, because Plaintiff did not waive her substantive statutory rights. The Supreme Court has found that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Gilmer, 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

Plaintiff also challenges the very existence of a contract between herself and Nuveen to arbitrate disputes. See Stone v. Pennsylvania Merchant Group, Ltd., 915 F. Supp. 727, 730 (E.D. Pa. 1996) (finding insufficient evidence to decide whether employee's Form U-4 created a contract with employer). In Stone, the defendant provided no evidence of its membership in the NASD. By contrast, Nuveen has submitted the affidavit of its Vice President, Michael G. Gaffney, who avers that Nuveen is a member of the NASD. As an NASD Member, Nuveen is an intended third-party beneficiary who may enforce the Form U-4 arbitration agreement. See Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316, 320-22 (E.D. Pa. 1996).

Finally, both the plaintiff and the EEOC argue that the arbitration agreement is unenforceable because Seus did not knowingly agree to waive her right to litigate. They stress that

the Form U-4 does not itself discuss employment disputes and, at the time Seus signed the form, the NASD Code did not expressly cover employment disputes. See Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), cert. denied, __ U.S. __, 116 S.Ct. 61 (1995) (refusing to enforce a Form U-4 signed before 1993 because neither the form nor the NASD Code notified plaintiffs that they would be required to arbitrate Title VII claims). See also Renteria v. Prudential Ins. Co., No. 95-16659, 1997 WL 259421 (9th Cir. May 20, 1997). However, this case is distinguishable from Lai because most of the alleged wrongful conduct occurred after the NASD Code's amendment.[3] Through the Form U-4's compliance clause, Seus agreed to be bound by changes to the NASD Code, which now clearly gives notice of its inclusion of employment disputes. Further, I agree with Lai's critics that the Form U-4's arbitration clause provides sufficient notice of its coverage. See, e.g., Beauchamp, 918 F. Supp. at 1098. Seus's misunderstanding of that clause's scope will not excuse her contractual obligations under the Form U-4. Id. See also Warren v. Greenfield, 407 Pa. Super. 600, 595 A.2d 1308, 1313 n. 4 (1991).

2. Claims Within Scope of Arbitration Agreement

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3. The complaint alleges that the sexual harassment occurred in 1991 and 1992. However, Seus's complaints and Nuveen's acts of alleged retaliation and discrimination all took place in 1994 and 1995.

Having found that the Form U-4 contains a valid arbitration clause, I must now decide whether the arbitration agreement covers employment disputes. Under Pennsylvania law, the agreement must objectively reveal the parties' intent to arbitrate a particular issue before a court will compel arbitration. PaineWebber, Inc. v. Johnson, 888 F. Supp. 46, 49 (E.D. Pa. 1995). Again, a court should resolve in favor of arbitration any doubts concerning the scope of arbitrable issues. Moses H. Cone Mem. Hosp., 460 U.S. at 24-25.

At the time Seus signed her Form U-4, the NASD Code did not explicitly mention employment disputes. Seus thus argues that she did not agree to submit employment claims to NASD arbitration. This argument is unavailing. The NASD itself took the position that employment-related disputes were arbitrable under the pre-amendment Code, and that they amended the Code only to clarify any possible ambiguity. See 58 Fed. Reg. 39,070, 39,071 (1993) (NASD statement accompanying proposed Code amendments). The majority of courts which have examined the pre-amendment NASD Code also have concluded that it covers employment disputes. See, e.g., Thomas James Assoc., Inc. v. Jameson, 102 F.3d 60, 65-66 (2d Cir. 1996); Armijo v. Prudential Ins. Co., 72 F.3d 793, 798 (10th Cir. 1995); Kidd v. Equitable Life Assur. Soc'y, 32 F.3d 516, 518 (11th Cir. 1994); Association of Inv. Brokers v. Securities & Exchange Comm'n, 676 F.2d 857, 861 (D.C. Cir. 1982). But see Farrand, 993 F.2d at 1255; Lai, 42 F.3d at

1305. I agree that the pre-1993 NASD Code encompasses employment disputes such as the one now before me.

Further, in light of the Form U-4 compliance clause, courts generally agree that the NASD Code should be examined at the time the plaintiff filed the suit rather than when the plaintiff signed the Form U-4. See, e.g., Kuehner v. Dickinson & Co., 84 F.3d 316, 320 (9th Cir. 1996); Stone, 949 F. Supp. at 323; Wojcik v. Aetna Life Ins. & Annuity Co., 901 F. Supp. 1282 (N.D. Ill. 1995), clarified, 916 F. Supp. 729 (N.D. Ill. 1996). As mentioned above, most of the alleged wrongful conduct took place after the NASD Code's amendment, when it clearly covered employment disputes. Thus, Plaintiff's claims are within the scope of the arbitration agreement.

C. Impact of Post-Gilmer Laws

The EEOC and Plaintiff also contend that Gilmer should be reconsidered in light of subsequent statutory enactments. In Gilmer, the Supreme Court held that an individual may agree, before a dispute arises, to submit ADEA claims to compulsory arbitration.[4] At the same time, the Court acknowledged that an individual cannot be compelled to arbitrate a statutory claim

4. Courts generally have concluded that Title VII claims also may be subjected to compulsory arbitration. See, e.g., Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992). Similarly, PHRA claims also may be arbitrated. See Kaliden v. Shearson Lehman Hutton, Inc., 789 F. Supp. 179, 184 (W.D. Pa. 1991).

where "`Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory right at issue.'" 500 U.S. at 26 (quoting Mitsubishi, 473 U.S. at 628). The question then becomes whether the Older Workers Benefit Protection Act of 1990 ("OWBPA"), 29 U.S.C. § 626(f), and § 118 of the Civil Rights Act of 1991, 42 U.S.C. § 1981 note, manifest a congressional intent to preclude arbitration of employment discrimination claims. I find that they do not.

Neither the OWBPA nor § 118 contradicts the Supreme Court's finding that individuals may agree in advance to submit future employment disputes to arbitration. The OWBPA bars the waiver only of substantive rights under the ADEA; it does not bar an agreement to switch from a judicial to an arbitral forum. See Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 660-61 (5th Cir. 1995); Rice v. Brown Bros. Harriman & Co., No. 96-6326, 1997 WL 129396 (S.D.N.Y. Mar. 21, 1997); Kahalnik v. John Hancock Funds, Inc., No. 95-3933, 1996 WL 145842 at *3 (N.D. Ill. Mar. 27, 1996). Thus, the OWBPA does not prevent a pre-dispute agreement to arbitrate ADEA claims. Nor does § 118 evidence congressional hostility to pre-dispute arbitration agreements. Section 118 does not discourage but rather encourages the use of arbitration to resolve disputes arising under Title VII and the ADEA. See Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 53 n. 4 (7th Cir. 1995). Although the EEOC highlights legislative history which may be interpreted to preclude pre-dispute agreements, "[e]very case decided in the Courts of Appeal under §

118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims involving statutory rights." Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 882 (4th Cir.), cert. denied, __ U.S. __, 117 S.Ct. 432 (1996) (citing cases). I am not inclined to swim against the tide of such substantial, persuasive, and pervasive precedent.

D. Protection of Statutory Rights in Arbitration

The final issue is whether the NASD arbitration procedures would adequately protect Plaintiff's statutory rights under the ADEA and Title VII. For a federal claim to be arbitrable, arbitration must be compatible with the remedial scheme of the federal statute at issue. See Gilmer, 500 U.S. at 28 (quoting Mitsubishi, 473 U.S. at 637). Although courts should not assume that arbitral procedures are inadequate, a court may examine claimed procedural inadequacies in the specific case before it. Gilmer, 500 U.S. at 30, 33.

Many of Seus's arguments, however, echo those rejected by the Supreme Court in Gilmer when it examined the New York Stock Exchange's arbitral procedures, procedures which mirror those of the NASD. For example, the Court rejected the argument that arbitral procedures are deficient because arbitrators rarely issue written opinions. 500 U.S. at 31-32. I also shall follow the lead of the Supreme Court in declining "to indulge the presumption" that the NASD "will be unable or unwilling to retain

competent, conscientious and impartial arbitrators." Gilmer, 500 U.S. at 30 (quoting Mitsubishi, 473 U.S. at 634). Plaintiff herself will be permitted to assess the qualifications of the arbitrators hearing her claims: the NASD requires disclosure of the arbitrators' backgrounds and permits a preemptory challenge. §§ 21-22, NASD Manual (CCH) ¶¶ 3721-22 (1995). Further, the NASD recognizes the public policy implications of employment discrimination claims and thus requires that the arbitral panel have a majority of public arbitrators. See 58 Fed. Reg. 39,070, 39,071 (1993) (NASD statement accompanying proposed Code amendments); § 9(a), NASD Manual (CCH) ¶ 3709 (1995).

Plaintiff also questions whether NASD arbitrators will protect her Due Process rights. Specifically, she notes that arbitrators are not required to follow the law, and that an arbitral award cannot be vacated even if they misinterpret the law. In fact, the arbitrator's training guide does not tell arbitrators that they do not have to follow the law but rather states that they are not "strictly bound by case precedent or statutory law." See also Illyes v. John Nuveen & Co., Inc., 949 F. Supp. 580, 584 (N.D. Ill. 1996). If the arbitrators manifestly disregard the law, a court may vacate their award. See 9 U.S.C. § 10. As for Plaintiff's concern that she may be barred from presenting witnesses or evidence in support of her allegations, this concern is adequately addressed under the FAA. See 9 U.S.C. § 10(c) (permitting court to vacate award where

arbitrator refuses "to hear evidence pertinent and material to the controversy").

Plaintiff also worries that NASD arbitrators might disregard Title VII's provisions for punitive damages and fee shifting. Yet the arbitrator's training guide explicitly provides that arbitrators "can consider punitive damages as a remedy." The NASD Code also appears to permit the arbitrators to allocate costs. See, e.g., § 43, NASD Manual ¶ 3743 (1995). There is no indication that Plaintiff will be denied her substantive statutory rights.

Finally, in order to prove the inadequacy of NASD arbitral procedures, Seus requests that she be allowed to depose the NASD.[5] However, the Supreme Court already has recognized the adequacy of the New York Stock Exchange's procedures, which are functionally equivalent to those of the NASD. Further, after reviewing her requests, I find that much of the information Seus seeks may be found within the NASD Code itself. See, e.g., §§ 32-33, NASD Manual ¶¶ 3732-33 (1995) (detailing discovery procedures and subpoena powers). Under these circumstances, I see no need to grant Plaintiff's Motion to Depose the NASD.

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5. Specifically, she wishes to obtain testimony regarding: the number of arbitrators, including their race, sex, age and professional backgrounds, the procedure for selecting arbitrators, the cost of arbitration, the percentage of arbitration cases involving age and sex employment discrimination claims, the specific results of the arbitration decisions in employment discrimination cases, the availability of discovery, the available processes to compel the appearance of witnesses and testimony at the arbitration hearing, the hearing's location, the scheduling of hearings, and the timeliness of decisions.

III. Conclusion

In sum, I find that Plaintiff agreed to submit all employment-related disputes to arbitration. Her Title VII, ADEA, PHRA and tort claims all relate to her employment and thus are arbitrable. See, e.g., Weinstein v. The Equitable Life Assur. Soc'y, No. 96-3614, 1996 WL 557321 (E.D. Pa. Sep. 26, 1996). Because all of Plaintiff's claims are subject to arbitration, retaining jurisdiction would serve no purpose. Thus, I shall grant Defendant's Motion to dismiss this action and compel arbitration.

An order follows.

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O R D E R

AND NOW, this day of June, 1997, upon the reasoning in the attached Memorandum:

1. Defendant's Motion to Dismiss and Compel Arbitration is GRANTED. Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3-4, all claims are DISMISSED without prejudice. The parties are to arbitrate these claims pursuant to the terms of their arbitration agreement.

2. Plaintiff's Motion for Leave to Take Deposition of the National Association of Security Dealers Pursuant to Fed. R. Civ. P. 30(b)(6) is DENIED.

BY THE COURT

Robert S. Gawthrop, III, J.